JAMALUDDIN HASHIM

v.

PP

HIGH COURT MALAYA, ALOR SETAR
KN SEGARA J
[CRIMINAL APPEAL NO: 42-16-98]
14 AUGUST 1999

CRIMINAL LAW: *Penal Code - Section 375 - Statutory rape - Proof of victim's age - How to prove - Whether must tender victim's birth certificate - Whether identity card capable of proving victim's age - Whether failure to prove age must necessarily result in acquittal - Whether male ought to ask female to prove she is above 16 before having consensual sex*

EVIDENCE: *Proof of - Birth - Victim's age in statutory rape case - How to prove - Whether must tender victim's birth certificate - Whether identity card capable of proving victim's age - Births and Deaths Registration Act 1957, ss. 32 & 33 - National Registration Regulations 1990, First Schedule*

The appellant was convicted on two charges of statutory rape and this was his ensuing appeal. The only issue before the court was whether the prosecution had proved that the alleged victim was under 16 years of age at the time the offences were purported to have been committed. No evidence was adduced by the prosecution with regards the alleged victim's age and neither was her birth certificate tendered. The alleged victim's identity card was, however, tendered by the prosecution.

Held:

[1] For the offence of statutory rape under s. 375 of the Penal Code, an essential ingredient to be proved by the prosecution is that the victim, at the time of the offence, was under 16 years of age.

[2] It is the primary duty of the investigating officer, in cases of statutory rape, to ascertain that the age of the alleged victim was in fact below 16 years. He or she must get the strongest and best evidence available on this point. It is common knowledge that many young girls these days do look very mature and fully developed physically to be able to pass off, in appearance, as having attained the age of majority as well as womanhood. When there is consensual sex with such a person, it is unreasonable and unrealistic to expect a male partner to have the foresight to require his female partner to prove to him that she is above 16 years of age before he entertains her.

[3] The investigating officer in this case ought to have had no difficulty in procuring indisputable evidence of age from either the parents of the alleged victim or the victim personally by asking for a copy of her birth certificate. In the event neither the victim nor the parents of the victim had a copy of her birth certificate, surely the parents would have known her date of birth and with such information in hand, the investigating officer could have applied for a certified copy of the birth certificate from the department responsible for the registration of births and deaths, pursuant to s. 32 of the Births and Deaths Registration Act 1957. The entry in the register or certificate of birth shall, pursuant to s. 33(1) of the same Act, be received as evidence without further or other proof.

[4] The identity card of the alleged victim cannot in law be used as proof of her age or her date of birth. The particulars contained in an identity card are such particulars as are necessary for identification of the holder only. The date of birth is patently not a material particular relevant for identification and therefore, the Form of Identity Card in the First Schedule of the National Registration Regulations 1990 does not list out "date of birth" as one of the requisite particulars to be on the identity card. Thus, the prosecution had not adduced *prima facie* evidence that the alleged victim was under 16 years of age.

[Appeal allowed; accused acquitted and discharged.]

Legislation referred to:
Births and Deaths Registration Act 1957, ss. 33(1), (2), 32
National Registration Regulations 1990, regs. 5(1), (2), 24(1)
Penal Code, ss. 375, 376

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the prosecution - Azmi Ariffin DPP

Reported by S Dharmendran

JUDGMENT

KN Segara J:

The appellant (hereinafter referred to as the "accused") faced two amended charges punishable under s. 376 of the Penal Code for the offence of statutory rape of a girl named Suraya bt. Hamzah, aged 14 years and 4 months. The offence in the first amended charge was alleged to have been committed on 15 August 1997 between 8pm and 12.05am and the offence in the second amended charge was alleged to have been committed on 17

August 1997 between 8pm and 12 mid-night. Both offences were alleged to have been committed at the same place, namely, 5 Lorong Watt Siam, that is, at the house where the accused was then living. The accused was found guilty and convicted on both the amended charges, to which he had claimed trial, by the learned Sessions Court judge, Alor Setar. The accused was sentenced to eight years imprisonment and three strokes of the rotan on each of the charges. The sentence of imprisonment was ordered to run concurrently. The accused was, however, released on bail by the Sessions Court, pending his appeal to the High Court. The accused is a government servant working with the Pejabat Bomba.

The alleged victim (SP3) had left her house in Pendang on 15 August 1997 for Alor Setar without her father's knowledge and when her father (SP1) could not find her that day, he had lodged a police report. However, this report was never produced in Court. In Alor Setar, the alleged victim stayed at the house of the accused from 15 August 1997 till 19 August 1997. When she returned home on the evening of 19 August 1997, she was questioned by her father and thereafter, a police report was lodged by her on 20 August 1997 at about 11.20am to the effect that she had been forced into a car by an unknown person, taken to a house, imprisoned there from 15 August 1997 till 19 August 1997 and during the said period was raped by the same unknown person. This report was also not produced by the prosecution but was instead produced by the defence, as exh. D6 (see pp. 44 and 156, Record of Appeal). It is significant to observe that her evidence in Court contradicted this report (exh. D6) very materially for there was never a word by her that she had been forced into a car by an unknown person, until she was confronted by the defence with the report, exh. D6. Her testimony (before she was confronted with exh. D6) was that she had gone to the accused's house by taking a taxi from the bus station in Alor Setar, after her arrival from Pendang. Her credibility is very much suspect – in fact, her testimony was that she had been raped several times by the accused from 15 August 1997 – 19 August 1997.

Was exh. D6 the product of a fertile imagination manifesting the fury of a woman scorned or was she driven to make the report in order to escape from the wrath and displeasure of her father for having left the house without his permission and stayed away, thereafter, for four days? Was the accused the victim of circumstances manipulated by the alleged victim? The manner in which she got herself introduced and befriended the accused prior to the alleged incident and her subsequent visit and entry into the accused's house, unannounced, in the early hours of 6 February 1998, that is, at 4.15am, to wake him up from his sleep by knocking on his room door, speaks volumes about the character of the alleged victim. This visit

by her took place after the accused had already been charged in court for the alleged rape. It is corroborated by the accused's police report made on 6 February 1998 at 3.10pm (see exh. D10). The alleged victim's father's testimony in cross-examination:

> Suraya sekarang berada di Cheras Kuala Lumpur, Pusat Pemulihan Akhlak. Kerajaan hantar anak saya. Mahkamah Syariah hantar pada Pusat Pemulihan. (page 33, Record of Appeal)

is illuminating and leaves many questions unanswered about the character of the alleged victim, including her capability and shrewdness to achieve her desired ends.

Seventeen (17) grounds of appeal have been set out in the petition of appeal (p. 4, Record of Appeal) but for the purposes of a speedy disposal of this appeal before me, I was of the view it is only necessary to deal with one of the primary grounds of appeal, namely ground 4, which reads:

> 4. Yang Arif Puan Hakim adalah salah di sisi undang-undang di dalam tidak memutuskan bahawa di dalam kes 'statutory rape' di bawah seksyen 376 Kanun Kesiksaan, salah satu ingredien yang essential merupakan umur pengadu, yang mana ingredien essential ini perlu dibuktikan walaubagaimanapun oleh pihak pendakwaan secara melepasi keterangan munasabah, dan di dalam kes ini tiada keterangan sebegitu, yang merupakan satu fatal flaw dalam kes pendakwaan;

Mr. Karpal Singh, counsel for the appellant, readily agreed that this appeal should be argued and proceeded on this ground without abandoning his rights to proceed on all the other grounds, if necessary.

For the offence of statutory rape under s. 375 of the Penal Code (punishable under s. 376) an essential ingredient to be proved by the prosecution is that the victim, at the time of the offence, was under 16 years of age. In this case, the prosecution has completely failed to adduce *prima facie* evidence, let alone prove this ingredient beyond reasonable doubt.

All reference to evidence in this judgment shall generally be limited to that touching or relating to the age of the victim.

The father of the alleged victim (SP1) gave evidence. Other than testify that his daughter was schooling and in Form II in 1997, SP1 did not testify how old his daughter was at that time. He did not even give particulars of her date of birth. It would appear that the learned DPP who was prosecuting did not also ask SP1 whether he had a copy of his daughter's birth certificate.

Suraya binti Hamzah (SP3) appears to have merely stated her age as 15 at the time she was formally sworn as a witness. Then, at the start of her examination-in-chief, she tendered to court her identity card, which was marked as exh. P5. There was neither evidence from her as to her date of birth nor was she asked to produce a copy of her birth certificate.

Insp. Mariah bt. Mohd. Hashim (SP7) was the investigating officer of this case. The brevity of her "evidence" is shocking, to say the least. (p. 89, Record of Appeal). All that she testified was:

> Saya ada pegawai penyiasat dalam kes ini. [Period]!!

In my opinion, it would have been the primary duty of the investigating officer, in cases of statutory rape, to ascertain that the age of the alleged victim was in fact below 16 years. He or she must get the strongest and best evidence available on this point. It is common knowledge that many young girls these days do look very mature and fully developed physically to be able to pass off, in appearance, as having attained the age of majority as well as womanhood. When there is consensual sex with such a person it is unreasonable and unrealistic to expect a male partner to have the foresight to require his female partner to prove to him she is above 16 years of age before he entertains her!

The investigating officer in this case ought to have had no difficulty in procuring indisputable evidence of age from either the parents of the alleged victim or the victim personally by asking for a copy of the birth certificate. In the event neither the victim nor the parents of the victim had a copy of her birth certificate, surely the parents would have known the date of birth and with such information in hand, the investigating officer could have applied for a certified copy of the birth certificate from the department responsible for the registration of births and deaths, pursuant to s. 32 of the Births and Deaths Registration Act 1957 (Act 299). The relevant provisions of s. 32 reads as follows:

> 32. Issue of Certificates of Birth and Certificates of Death.
>
> (1) Any person may apply from the Superintendent-Registrar on the prescribed form a Certificate of Birth or a Certificate of Death pertaining to any entry in the register on payment of such fees as may be prescribed.
>
> (2) Every Certificate of Birth or Certificate of Death shall be certified under the hand of the Registrar or the Registrar-General or the Superintendent-Registrar having the custody of the register.
>
> (3) ...

(4) When any application for a Certificate of Birth or a Certificate of Death is made in pursuance to subsection (1) the Superintendent-Registrar shall issue it unless –

(a) the particulars given in the application form are incomplete or inadequate or in his opinion inaccurate; or

(b) for any reason it appears to him that an entry found upon search cannot, with certainty, be connected with the person in respect of the registration of whose birth or death the certificate is applied for.

(5) When the Superintendent-Registrar has refused to furnish the Certificate of Birth or the Certificate of Death under this section, the applicant may in writing appeal to the Registrar-General, whose decision shall be final.

Section 33(1) of the same Act provides that the entry in the register or Certificate of Birth shall be received as evidence, and s. 33(2) sets out when it shall not be received as evidence. For ease of comprehension s. 33 is reproduced below:

s. 33. Entry in register as evidence of birth or death.

(1) Subject to the provisions of this section an entry or a Certificate of Birth or a Certificate of Death relating thereto purporting to have been duly certified under section 32(2) shall be received without further or other proof as evidence of such facts and particulars relating to such birth or death as are or were at the time of the making of such entry required by law to be set forth in such entry or certificate.

(2) An entry in a register or a Certificate of Birth or a Certificate of Death relating thereto, shall not be received as evidence under this section unless:

(a) the entry purports to be signed by some person professing to be the informant and to be such a person as might be required by law at the date of the entry to give to the Registrar information concerning that birth or death; or

(b) the entry is an entry of a birth which is signed by a person professing to be a Superintendent-Registrar, or which purports to have been made with the authority of the Registrar-General; or

(c) the entry is an entry of a death which purports to have been made upon a certificate from a Coroner or Magistrate; or

(d) the entry purports to have been made in pursuance of any written law relating to the registration of births and deaths at sea or on board an aircraft, or

(e) the entry is:

(i) an entry in any register, book of record or document recording particulars of births and deaths which has been kept or preserved under or in accordance with the provisions of any former written law relating to the registration of births and deaths; and

(ii) such entry or a certified copy of such entry would immediately before the coming into force of this Act have been received as evidence of the facts or particulars in respect of which such entry or certified copy is produced as evidence.

(3) For the purposes of this section a Certificate of Birth or a Certificate of Death shall be deemed to be a certified copy if it purports to have been certified in accordance with section 32(2) notwithstanding that it may be:

(a) photographically reproduced; or

(b) an extract of the information contained in the register in a form prescribed which form may be different from that in which the original entry was made.

Exhibit P5, the identity card of the alleged victim, cannot in law be used for proof of her age or her date of birth. There is no presumption concerning the contents of identity cards and the burden of proving the truth of any particulars therein lies on the person to whom such identity card was issued or any other person alleging the truth of such contents. There is no ambiguity in reg. 24(1) National Registration Regulations 1990 (P.U.(A) 472) which provides:

24.(1) The burden of proving the truth of the contents of any written application for registration under these Regulations, or the contents of an identity card, shall be on the applicant, or on the person to whom such identity has been issued, or on any other person alleging the truth of such contents.

Under the National Registration Regulations 1990 "identity card" means

an identity card issued under regulation 5(1) and includes replacement identity card issued under regulations 13, 14, 15 and 18, an identity card issued before the coming into force of these Regulations and any temporary document of identity issued under regulation 5(5);

Regulation 5(1) and reg. 5(2) reads as follows:

5(1) The registration officer may at his discretion issue to the person giving the particulars referred to in regulation 4 an identity card as prescribed in subregulation (2) of this regulation containing a copy of such person's photograph, thumb impressions and such other particulars as may be necessary for his identification.

(2) An identity card shall be in the form prescribed in the First Schedule and shall contain the particulars as prescribed in that Schedule and such other particulars as may be necessary for the identification of the person to whom it is issued.

The particulars contained in an identity card are such particulars as are necessary for identification of the holder only. In this regard, the right and left thumb impression would be most crucial. The date of birth is patently not a material particular relevant for identification and very correctly, therefore, the FORM OF IDENTITY CARD in the First Schedule of the National Registration Regulations 1990 does not list out "date of birth" as one of the requisite particulars either on the obverse or reverse of the identity card. The First Schedule of the National Registration Regulations 1990 is reproduced below:

FIRST SCHEDULE

[Regulation 5(2)]

FORM OF IDENTITY CARD

The identity card will contain the following particulars:

Obverse:

1. Identity Card Number
2. Name
3. Residential Address
4. Date of Issue
5. Old Identity Card Number (if any)
6. Identity Code for native of the State of Sabah or Sarawak
7. Residential Status
8. Holder's Photographs

Reverse

9. Signature of Director General of National Registration

10. Left Thumb Impression

11. Right Thumb Impression.

I have called for and examined exh. P5 (which was a photostat copy of the alleged victim's identity card). It is issued in conformity with reg. 5(2) and the First Schedule of National Registration Regulations 1990. The date of birth of the person to whom the identity card was issued is not given either on the obverse or the reverse of exh. P5. The prosecution, therefore, had not adduced *prima facie* evidence that the alleged victim was under 16 years of age. In the circumstances, the learned Sessions Court judge ought not to have called for the accused to enter his defence.

Appeal allowed. Conviction and sentence set aside.

Accused is acquitted and discharged.